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HYPNOSIS OF THE ACCUSED: DEFENDANT'S CHOICE

1. INTRODUCTION

The forensic use of hypnosis is not a new phenomenon,¹ yet every aspect of the use of hypnosis in criminal investigations and trials has created sharp and unresolved controversies among the courts² and experts³ in recent years. Several courts have held that hypnotically induced⁴ testimony is never admissible because practitioners in the fields of psychiatry and medicine generally have not accepted hypnosis as a reliable method of inducing accurate memory recall.⁵ Other courts have admitted hypnotically induced testimony if the proponent of the testimony proves strict adherence to

¹ For a brief survey of the history of hypnosis in criminal investigation, see Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1, 1-4 (1964) [hereinafter cited as *Hypno-Induced Statements*].

² See, e.g., *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982) (witness who has been hypnotized may never testify in court to a fact in issue in that case); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1982) (hypnotically induced testimony is admissible if likely to result in recall comparable to normal human memory); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386, cert. denied, 103 S. Ct. 2125 (1983) (admissibility of hypnotically induced testimony will be considered on a case-by-case basis).

³ See, e.g., *Hurd*, 86 N.J. at 533, 432 A.2d at 96; *People v. Boudin*, 118 Misc. 2d 230, 238, 460 N.Y.S.2d 879, 884 (Sup. Ct. 1983) (both cases quoting Dr. Martin Orne that hypnosis is likely to cause memory distortions but adherence to his procedural guidelines safeguards hypnotic process against taint and diminishes likelihood of miscarriages of justice); *Boudin*, 118 Misc. 2d at 233-34, 460 N.Y.S.2d at 881 (quoting Drs. Barber and Spiegel that hypnotically induced memory distortions are the exception rather than the rule); see also *People v. Hughes*, 59 N.Y.2d 523, 534, 453 N.E.2d 484, 489, 466 N.Y.S.2d 255, 260 (1983) (citing Dr. Bernard Diamond, who condemns the forensic use of hypnosis). The *Boudin* court stated that Drs. Herbert Spiegel, Theodore Barber, Martin Orne, and Richard Hilgard are the four leading experts in the field of hypnosis. *Boudin*, 118 Misc. 2d at 232, 460 N.Y.S.2d at 880.

⁴ The term "hypnotically induced" refers to statements initially produced during hypnosis. *Boudin*, 118 Misc. 2d at 236, 460 N.Y.S.2d at 882.

⁵ See, e.g., *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982); *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982); *Rodriguez v. State*, 327 So. 2d 903 (Fla. App.), cert. denied, 336 So. 2d 1184 (Fla. 1976); *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974); *People v. Harper*, 111 Ill. App. 2d 204, 250 N.E.2d 5 (1969); *Polk v. State*, 48 Md. App. 382, 427 A.2d 1041 (1981); *People v. Gonzalez*, 108 Mich. App. 145, 310 N.W.2d 306 (1981), aff'd, 415 Mich. 615, 329 N.W.2d 743 (1982); *People v. Tait*, 99 Mich. App. 19, 297 N.W.2d 853 (1980); *People v. Mack*, 292 N.W.2d 764 (Minn. 1980); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983);

procedural guidelines promulgated by Dr. Martin Orne.⁶ Still other courts have held that although witnesses may not testify to memories recalled during hypnosis, they may testify to memories recalled prior to hypnosis.⁷

A survey of the scientific literature and the in-court testimony of hypnosis experts reveals that the experts agree on a general definition of the hypnotic state,⁸ that memory distortions can occur as a result of hypnosis,⁹ that hypnosis is a suggestive procedure,¹⁰ and that hypnosis does not insure the veracity of statements produced in the hypnotic state.¹¹ The experts also agree that adherence to Dr.

State v. Harris, 241 Or. 224, 405 P.2d 492 (1965); Commonwealth v. Nazarovitch, 498 Pa. 97, 436 A.2d 170 (1981); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1979).

⁶ For a discussion of Dr. Orne's procedural guidelines, see *infra* notes 49-62 and accompanying text. Dr. Orne is a Doctor of Medicine and Professor of Psychiatry at the University of Pennsylvania, and Director of the Unit for Experimental Psychiatry and Senior Attending Psychiatrist at the University of Pennsylvania Hospital. He also has a Ph.D. in Psychology. He is past president of the Society for Clinical and Experimental Hypnosis, past president of the International Society for Hypnosis, and has been editor of the International Journal of Clinical and Experimental Hypnosis for the past twenty years. He has served as a reviewer of research proposals on hypnosis for the National Science Foundation, the National Institute of Mental Health, the Office of Scientific Research of the United States Air Force, and the Office of Naval Research. He has published more than one hundred scientific articles. Dr. Orne has taught hypnosis, researched the nature of hypnosis, and used hypnosis in clinical practice.

The following courts have either adopted Dr. Orne's procedural guidelines for the use of hypnosis or have used his guidelines to promulgate their own procedural rules for the use of hypnosis in criminal investigations and trials: People v. Gibson, 117 Ill. App. 3d 270, 452 N.E.2d 1368 (1983); Commonwealth v. Juvenile, 381 Mass. 727, 412 N.E.2d 339 (1980); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (1981); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); People v. Lucas, 107 Misc. 2d 231, 435 N.Y.S.2d 461 (Sup. Ct. 1980); People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (Sup. Ct. 1980); People v. McDowell, 103 Misc. 2d 831, 427 N.Y.S. 2d. 181 (Sup. Ct. 1980); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983); State v. White, No. J-366, slip op. (Wis. Cir. Ct. Mar. 27, 1979).

⁷ See, e.g., State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); Pearson v. State, 441 N.E.2d 468 (Ind. 1982); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Wallach, 110 Mich. App. 37, 312 N.W.2d 387 (1981); State v. Koehler, 312 N.W.2d 108 (Minn. 1981); State v. Patterson, 213 Neb. 686, 331 N.W.2d 500 (1983); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

⁸ See *Boudin*, 118 Misc. 2d at 233, 460 N.Y.S.2d at 881 (citing the testimony of Doctors Spiegel and Barber).

⁹ See *id.* at 233-34, 460 N.Y.S.2d at 881-82 (citing the testimony of Doctors Spiegel, Barber, Diamond, and Orne).

¹⁰ See *Hughes*, 59 N.Y.2d at 534, 453 N.E.2d at 489, 466 N.Y.S.2d at 260 (citing 9 ENCYCLOPEDIA BRITANNICA, Macropaedia, *Hypnosis*, 133-34 (1981) (article by Dr. Martin Orne)); J. COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 579 (2d ed. 1960); Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 570 (1977) [hereinafter cited as *Admissibility of Hypnotic Statements*].

¹¹ See *Admissibility of Hypnotic Statements*, *supra* note 10, at 584; Orne, *Use and Misuse of Hypnosis in Court*, 27 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 311, 317-18 (1979),

Orne's guidelines will increase the probability of gaining reliable information from a hypnotized subject.¹²

This Comment will demonstrate that in light of the agreement among experts about the nature and reliable uses of hypnosis, courts should adopt Dr. Orne's guidelines and use them to test the admissibility of hypnotically induced confessions and exculpatory statements. Not only do the guidelines ensure that the hypnotically induced information will be reasonably reliable,¹³ but use of the guidelines will also protect the defendants' constitutional rights to aid in their own defenses and to be free from self-incrimination. The guidelines do not, however, guarantee the voluntariness or the veracity of hypnotically induced statements. Thus, in cases where hypnosis produces confessions, courts may not admit those confessions unless the defendant also gives informed consent in the presence of counsel to the hypnosis, and the prosecution produces independent verification of the confession.

The analysis begins with a brief overview of the scientific opinions regarding the nature of hypnosis. The Comment then discusses the possible uses of hypnosis on the accused in criminal investigations and trials. Next, the Comment focuses on Dr. Martin Orne's guidelines for the forensic use of hypnosis and the relation of his guidelines to the admissibility of hypnotically induced testimony. The analysis then considers solutions to the problems involved with the use of hypnosis by the prosecution and defense to obtain confessions and exculpatory statements from criminal suspects and defendants. The Comment shows that suspects and defendants have constitutional rights to use hypnosis to aid in the

reprinted in 3 CRIME AND JUSTICE 61, 63 (M. Tonrey & N. Morris eds. 1981) [hereinafter cited as *Use and Misuse of Hypnosis in Court*; page citations refer to CRIME AND JUSTICE publication unless otherwise specified]; Spiegel, *Hypnosis and Evidence: Help or Hindrance*, 347 ANNALS N.Y. ACAD. SCI. 73, 79 (1980) [hereinafter cited as *Hypnosis and Evidence*].

¹² See *Boudin*, 118 Misc. 2d at 238-39, 460 N.Y.S.2d at 884-85. The court cited the testimony of Doctors Barber and Spiegel, who maintain that hypnotically induced information is more reliable when "the integrity of the hypnotic procedure is preserved"; thus, several New York courts have adopted variations of the Orne guidelines in order to preserve the integrity of the hypnotic process and thereby increase the reliability of hypnotically induced information. *Id.* The court in *Boudin* specifically rejected the adoption of a per se rule for or against admitting hypnotically induced statements into evidence, and stated:

to adopt a rigid posture for or against admissibility is to ignore the diversity and complexity of situations involving hypnosis. These [Orne] safeguards also suggest that the hazards of hypnosis can be minimized to the point where the testimony which has been refreshed by hypnosis can be deemed reliable, and therefore admissible.

Id.

¹³ *Hurd*, 86 N.J. at 538, 432 A.2d at 92. See *infra* notes 44-62 and accompanying text.

preparation of their own defenses and to be free from the use of hypnosis in order to avoid self-incrimination. Finally, this Comment argues that courts should admit hypnotically induced exculpatory statements of the accused when hypnotists follow Orne's procedural guidelines. Courts should not admit hypnotically induced confessions, however, unless, in addition to adherence to Orne's guidelines, defendants also give informed consent to the hypnosis and the prosecution independently verifies the confession.

II. DEFINING THE NATURE AND RELIABLE USES OF HYPNOSIS

A. THE NATURE OF HYPNOSIS

Hypnosis experts generally agree that the hypnotic state is "one of increased relaxation wherein the subject can concentrate or focus on a particular area."¹⁴ They also agree that the way in which the hypnotist conducts the hypnosis affects the quality of the information produced under hypnosis.¹⁵ They further agree that hypnotized subjects may experience "the phenomena of fantasy, increased suggestibility, concreting, confabulation and other so-called 'contaminations' of the memory process" during and after hypnosis.¹⁶ Finally, all of the experts agree that only licensed psychiatrists or

¹⁴ *Boudin*, 118 Misc. 2d at 233, 460 N.Y.S.2d at 881 (citing Drs. Spiegel and Barber).

¹⁵ *Hurd*, 86 N.J. at 536, 432 A.2d at 91.

¹⁶ *Boudin*, 118 Misc. 2d at 233, 460 N.Y.S.2d at 881. Experts define "confabulation" as the filling in of "forgotten details between remembered events, in accordance with what . . . [subjects] . . . deduce should have occurred as opposed to what they actually remember." R. UDOLF, *FORENSIC HYPNOSIS* 190 (1983). "Concreting" occurs when subjects become innocently convinced of the truth of their memories. *Id.* (referring to concreting as the "honest liar" syndrome). Concreting occurs in the normal memory process, but a hypnotized person is more susceptible to the phenomenon. *Id.*; cf. *Boudin*, 118 Misc. 2d at 234, 460 N.Y.S.2d at 881 (citing Drs. Spiegel and Barber that concreting "rarely occurs and if it does, it only occurs with a highly suggestible subject and where there has been a deliberate attempt to impose the 'concreting' process on the subject").

Dr. Martin Orne also believes that the behavior of the hypnotist affects the degree to which concreting and confabulation occur. Dr. Orne recently testified in a case involving the hypnosis of a defendant accused of murder. The defendant claimed prior to hypnosis that he was asleep at the time of the murder, but after hypnosis the defendant confessed to the murder. Orne testified that

[i]t is very characteristic to find some element of what happened during the time before or after the events during which somebody doesn't recall anything. . . . [I]f he's been asleep, then he would take something from before and after and put that into the period which he's trying to remember things for . . . and he would use those elements of reality in confabulating what he's put in there. . . . [E]mpirical research . . . shows that if you try and have someone remember something . . . while in fact they were . . . asleep, and they do remember it during hypnosis, it is easily incorporated into their normal memory subsequently and becomes what they believe occurred while they in fact were asleep. . . . [U]nder the circumstances [of this case] . . . there would have been no conflicting recall. . . . [The defendant] . . . had been given suggestions that he in fact did it [the murder] before he was hypnotized. . . . [H]e now is hypnotized and told that he will come up with true

psychologists trained in the use of hypnosis should perform hypnosis.¹⁷

The experts disagree, however, over the extent to which hypnosis causes memory contamination. They also disagree on whether hypnotically induced information is reliable. At one extreme, Dr. Diamond, a forensic psychologist, argues that no one can know whether hypnosis completely contaminates the memory; he believes that courts should bar not only hypnotically induced testimony, but also all testimony of any person hypnotized to recall facts about the case the court is hearing.¹⁸ Dr. Martin Orne has developed procedural guidelines that he believes diminish the dangers of memory contamination, and he supports admission of hypnotically induced testimony if the proponent of the testimony independently verifies the testimony.¹⁹ Drs. Barber and Spiegel believe that few contaminations of the memory occur in hypnosis and would admit hypnotically induced testimony in most cases.²⁰

Thus, only one doctor, who is not a hypnosis expert, argues that hypnotically induced testimony should never be admissible in court. The remaining experts agree on the nature of the hypnotic state and would admit hypnotically induced testimony in court, at least in cases where the proponent of the testimony proves adherence to Dr. Orne's procedural guidelines. The courts, meanwhile, have used the experts' agreements and disagreements to make their

recollections. When he comes up with recollections, . . . the hypnotist validates . . . [the recollections by] . . . saying these are the truth.

Report of Proceedings on Motion to Suppress at 102-05, *People v. William Boyd, Jr.*, No. 81 C 6190 (2d Dist., Ill. Feb. 28, 1983) (direct testimony of Dr. Martin Orne); *see also Use and Misuse of Hypnosis in Court*, *supra* note 11, at 61 (degree of concreting depends on individual's belief in ability of hypnosis to yield truth and on integrity of hypnotist in employing hypnosis).

¹⁷ *Hurd*, 86 N.J. at 545, 432 A.2d at 96; *see also* 27 INT'L. J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 452 (1979) (the Society for Clinical and Experimental Hypnosis and the International Society of Hypnosis adopt resolutions condemning use of hypnosis by police-trained hypnotists).

¹⁸ *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982) (relying on the testimony of Dr. Bernard Diamond). The California Supreme Court is the only court that has completely adopted Dr. Diamond's view that courts should bar all testimony of any person hypnotized to recall facts about the case the court is hearing. Other courts do not consider Dr. Diamond an expert in the field of hypnosis, and he does not consider himself an expert in the field. *Boudin*, 118 Misc. 2d at 233, 460 N.Y.S.2d at 881. Dr. Diamond's article, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 88 CALIF. L. REV. 313 (1980), though frequently quoted, is highly controversial. *Boudin*, 118 Misc. 2d at 233, 460 N.Y.S.2d at 880. Diamond has not used hypnosis since 1968, and he has not done any clinical work in hypnosis to support his conclusions. *Id.* at 236, 460 N.Y.S. 2d at 882.

¹⁹ *Hurd*, 86 N.J. at 539, 432 A.2d at 93 (citing *Use and Misuse of Hypnosis*, *supra* note 11, at 317-18).

²⁰ *Boudin*, 118 Misc. 2d at 233-34, 460 N.Y.S.2d at 881.

own determinations of whether to admit hypnotically induced testimony.

B. USES OF HYPNOSIS ON THE ACCUSED IN CRIMINAL INVESTIGATIONS AND TRIALS

The results of hypnotic sessions with defendants can be put to three possible uses. First, defense counsel can use hypnotically induced information to obtain leads to other information.²¹ Second, the prosecution can use hypnosis to obtain a confession.²² Finally, defense counsel can use hypnosis to obtain exculpatory statements.²³ Courts thus far have permitted the use of hypnosis to obtain leads to other information, but generally have not admitted hypnotically induced confessions or alibis. In determining whether to permit each of the three uses, courts have focused on the scientific controversy over the degree of reliability of hypnotically in-

²¹ See *Cornell v. Superior Court of San Diego County*, 52 Cal. 2d 99, 338 P.2d 447 (1959).

²² See Report of Proceedings on Motion to Suppress, *People v. William Boyd, Jr.*, No. 81 C 6129 (2d Dist. Ill. Feb. 18, 1983) [hereinafter cited as *Boyd Proceedings*, Feb. 18]; Report of Proceedings on Motion to Suppress, *Boyd*, No. 81 C 6190 (2d Dist. Ill., Feb. 28, 1983) [hereinafter cited as *Boyd Proceedings* 6190, Feb. 28]; Report of Proceedings on Motion to Suppress, *Boyd*, No. 81 C 6129 (2d Dist. Ill., Feb. 28, 1983) [hereinafter cited as *Boyd Proceedings* 6129, Feb. 28]; Motion to Suppress Statements, *Boyd*, No. 81-6129 (Cook County, Ill., Crim. Div., filed April 6, 1982) [hereinafter cited as *Boyd Motion to Suppress*]; Motion to Dismiss Indictment, *Boyd*, No. 81-6129 (Cook County, Ill., Crim. Div., filed June 11, 1982) [hereinafter cited as *Boyd Motion to Dismiss*]; Silberman, *Hypnotic Confession*, *The Reader*, Sept. 2, 1983, at 1, cols. 1-2 [hereinafter cited as Silberman] (*Boyd* decision on motion to suppress confession published only here). The court did not publish its opinion. For other cases involving the admissibility of hypnotically induced confessions, see *Leyra v. Denno*, 347 U.S. 556 (1954) (refusing admission of confession gained under circumstances amounting to mental coercion); *Coon v. State*, 380 So. 2d 980 (Ala. Crim. App. 1979), *aff'd*, 380 So. 2d 990 (Ala. 1980) (admitting defendant's confession although police hypnotized defendant before defendant confessed); *People v. Norcott*, 44 Ill. 2d 256, 255 N.E.2d 442 (1970) (admitting defendant's confession despite defendant's contentions that the police hypnotized him and he therefore confessed involuntarily); *State v. Walker*, 416 S.W.2d 134 (Mo. 1967) (admitting defendant's confession despite defendant's contention that police took him to professor who hypnotized him); *People v. Baldi*, 80 Misc. 2d 118, 362 N.Y.S.2d 927 (Sup. Ct. 1974), *rev'd*, 76 A.D.2d 259, 429 N.Y.S.2d 677 (1980), *rev'd*, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981) (admitting defendant's confession despite facts that defendant confessed while in trance-like state and police previously had caused psychiatrist to hypnotize defendant); *Rex v. Booher*, 4 D.L.R. 795 (Can. 1928) (confession excluded because obtained after defendant had session with doctor who practiced mesmerism); R. UDOLF, *supra* note 16, at 108 (stating that the defendant in *Leyra* probably was hypnotized).

²³ See, e.g., *People v. Ebands*, 117 Cal. 652, 49 P. 1049 (1897); *People v. Hangsleben*, 86 Mich. App. 718, 273 N.W.2d 539 (1978); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974), *writ of habeas corpus denied sub nom.* *Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976).

duced information. The courts permit or reject the use of hypnosis depending on their resolution of the reliability issue.

The first use of hypnosis, to obtain leads to other information, presents no reliability problem because counsel is not attempting to admit the substance of any hypnotically induced statements in court.²⁴ For example, in *Cornell v. Superior Court of San Diego County*, the defendant's counsel sought to hypnotize the defendant to discover derivative evidence.²⁵ The court held that the reliability of the defendant's statements under hypnosis was not an issue because the defense did not seek to admit those statements in court.²⁶ Citing the defendant's constitutional right to counsel, the court held that this right included the right to consult privately with counsel and with any experts counsel might require to prepare the defense.²⁷

The second use, admission of hypnotically induced confessions, can present problems of reliability and voluntariness. In the unreported case of *People v. William Boyd, Jr.*, the prosecution hypnotized Boyd without his consent.²⁸ During hypnosis, Boyd "confessed" to murdering a young girl.²⁹ The prosecution then sought to admit Boyd's hypnotically induced murder confession in court.³⁰ The court did not publish an opinion, but the record of the pretrial hearing indicates that the controversy centered on two issues. Defense counsel argued first that Boyd did not voluntarily confess because he had not expressly consented to the use of hypnosis.³¹ Defense counsel then argued that hypnosis in general is not reliable to enhance accurate memory recall,³² and that the hypnotic procedure used on Boyd was particularly unreliable for purposes of producing

²⁴ *People v. Hughes*, 59 N.Y.2d 523, 536, 453 N.E.2d 484, 490, 466 N.Y.S.2d 255, 260-61 (1983) (experts agree that the use of hypnosis to obtain leads is permissible because issue of reliability is moot once proponent independently verifies hypnotically induced information).

²⁵ 52 Cal. 2d 99, 338 P.2d 447 (1959).

²⁶ *Id.* at 102, 338 P.2d at 449. In *Cornell*, the State charged the defendant with murder. Due to "intoxication, shock, or otherwise," the defendant was unable to remember his whereabouts during the time of the murder. *Id.* at 101, 338 P.2d at 448. Prior to hypnosis of the accused, defense counsel was able to ascertain only that his client was "wandering from bar to bar" on the night of the murder. *Id.*

²⁷ *Id.* at 102-03, 338 P.2d at 449.

²⁸ *Boyd Proceedings*, Feb. 18, *supra* note 22; *Boyd Proceedings* 6190, Feb. 28, *supra* note 22; *Boyd Proceedings* 6129, Feb. 28, *supra* note 22, at 73; see *infra* note 75 and accompanying text for a discussion of how the police hypnotized Boyd without Boyd's consent.

²⁹ *Boyd Proceedings* 6129, Feb. 28, *supra* note 22, at 32, 169, 173.

³⁰ *Boyd Motion to Suppress*, *supra* note 22, at 1.

³¹ *Boyd Proceedings* 6129, Feb. 18, *supra* note 22, at 13, 73, 92, 96, 180.

³² *Boyd Proceedings* 6129, Feb. 28, *supra* note 22, at 74.

accurate memory recall.³³ The court excluded Boyd's confession because the confession was neither voluntary nor reliable.³⁴ The court, however, did not resolve the question of when to admit hypnotically induced confessions because it did not address solutions to the voluntariness and reliability problems.

The third use of hypnosis on an accused, defense counsel's use of hypnosis to obtain exculpatory statements and to admit those statements in court, also forces courts to focus on the reliability problem. In *Greenfield v. Robinson*³⁵ and *People v. Hangsleben*,³⁶ the defendants agreed to use hypnosis to help them recall the events of the nights in question. In neither case did the hypnosis help uncover independent evidence that might have absolved those accused of the crimes. In both cases, the defendants' counsel sought to admit the defendants' hypnotically induced statements to bolster the credibility of the defendants' prehypnotic statements of innocence.³⁷ Both courts excluded the hypnotically induced statements because of the "potential unreliability"³⁸ of hypnotic evidence.³⁹ In both cases, the hypnotically induced statements were the only exculpatory evidence that the defendants' counsel had at their disposal,⁴⁰ but because neither counsel could overcome the reliability problem, the courts excluded their only exculpatory evidence.⁴¹

³³ *Boyd Proceedings* 6190, Feb. 28, *supra* note 22, at 102-05.

³⁴ Silberman, *supra* note 22, at 34.

³⁵ 413 F. Supp. 1113 (W.D. Va. 1976) (denying writ of habeas corpus from conviction in *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974)).

³⁶ 86 Mich. App. 718, 278 N.W.2d 539 (1978).

³⁷ *Greenfield*, 413 F. Supp. at 1120 (defense argued that admission of hypnotically induced testimony would enable defendant to fully develop his defense); *Hangsleben*, 86 Mich. App. at 727-28, 273 N.W.2d at 543 (defense argued that admission of hypnotically induced testimony would explain discrepancies in defendant's earlier inconsistent admissions to police).

³⁸ *Greenfield*, 413 F. Supp. at 1120.

³⁹ *Id.*; *Hangsleben*, 86 Mich. App. at 730-31, 273 N.W.2d at 544. Defendants' counsel in both cases also sought to refer to the fact of the hypnosis, without admitting the hypnotically induced statements, to bolster the credibility and explain the inconsistencies of the defenses. *Greenfield*, 413 F. Supp. at 1117; *Hangsleben*, 86 Mich. App. at 728, 273 N.W.2d at 543. Neither court allowed this use of hypnosis. *Greenfield*, 413 F. Supp. at 1117; *Hangsleben*, 86 Mich. App. at 729, 273 N.W.2d at 544.

⁴⁰ *Greenfield*, 413 F. Supp. at 1120 (defense had no positive evidence about an alternative murder weapon, and neither prosecution nor defense had any direct evidence of the crime); *Hangsleben*, 86 Mich. App. at 727-31, 273 N.W.2d at 543-45 (all evidence was either circumstantial or consisted of defendant's prehypnotic incriminating statements and posthypnotic exculpatory statements).

⁴¹ See also *State v. Conley*, 6 Kan. App. 2d 280, 627 P.2d 1174 (1981) (substance of defendant's hypnotic session offered by accused to prove truth of matters asserted held inadmissible absent binding agreement by both parties); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950) (defense offered to admit audio recordings of hypnotic sessions in which all statements by accused tended to show innocence of the accused; court held

Therefore, both hypnotically induced confessions and exculpatory statements present reliability problems. Dr. Orne's guidelines resolve the reliability problem because adherence to the guidelines reasonably ensures the reliability of the hypnotically induced information.⁴² Several courts have adopted Dr. Orne's guidelines and require proof of adherence to the guidelines to admit the hypnotically induced statements of witnesses and victims in criminal cases.⁴³ The remainder of this Comment will show that by adopting Orne's guidelines and, in cases of hypnotically induced confessions, by requiring informed consent and independent verification, courts will have a principled test to determine the admissibility of defendants' hypnotically induced confessions and exculpatory statements.

III. ADMISSIBILITY AT TRIAL OF DEFENDANTS' PRETRIAL HYPNOTICALLY INDUCED STATEMENTS

A. DR. ORNE'S PROCEDURAL GUIDELINES AND THEIR RELATION TO ADMISSIBILITY OF DEFENDANTS' HYPNOTICALLY INDUCED CONFESSIONS AND EXCULPATORY STATEMENTS

Admitting the results of a scientific test into evidence depends not upon guarantees of veracity,⁴⁴ but only upon whether the test is

recordings inadmissible without explanation); *Jones v. State*, 542 P.2d 1316 (Okla. Ct. App. 1974) (substance of defendant's pretrial hypnosis and doctor's opinion as to truthfulness of defendant's hypnotic statements deemed inadmissible because unreliable).

⁴² *Hurd*, 86 N.J. at 535-46, 432 A.2d at 93-97 (if proponent of hypnotically induced testimony follows Orne's guidelines, proponent will satisfy *Frye* test of general reliability). See *infra* note 45 and accompanying text for a discussion of *Frye*; see also *Boudin*, 118 Misc. 2d at 239, 460 N.Y.S.2d at 884 (guidelines suggest hazards of hypnosis can be minimized to the point where hypnotically refreshed testimony is reliable and therefore admissible).

⁴³ See *supra* note 6 and cases cited therein.

⁴⁴ The court in *State v. Hurd* stated:

[T]he court below did not demand, as a pre-condition of admissibility, that hypnosis be generally accepted as a means of reviving truthful or historically accurate recall. We think this was correct. The purpose of using hypnosis is not to obtain truth, as a polygraph or "truth serum" is supposed to do. Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness. See Spector and Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 584 (1977). . . . In light of this purpose, hypnosis can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate.

86 N.J. at 537-38, 432 A.2d at 92. In *State v. Collins*, the court stated:

"What next? Once we begin to rule evidence inadmissible because of our dissatisfaction with the witness' credibility based on improper memory jogging, where do we stop? What about witnesses who have been brainwashed, coached, coerced, bribed or intimidated? Are we going to reject all this testimony because it is suspect? . . . Once having undergone exposure to something of this nature is the witness still going to be allowed to give his best recollection, or be precluded from testifying?

"I am firmly of the belief that jurors are quite capable of seeing through flaky

"generally recognized as reliable for the purpose used by experts in the appropriate scientific community."⁴⁵ Experts do not use hypnosis for the purpose of guaranteeing the truthfulness of hypnotically induced statements;⁴⁶ rather, psychiatrists and psychologists use hypnosis to induce concentration on a past event so that the subject will reveal previously unremembered aspects of the event.⁴⁷ Properly conducting the hypnotic process increases the likelihood that the hypnotically induced information will be reliable.⁴⁸ The guidelines discussed below are designed to ensure the proper management of the hypnotic process, and to "minimize the likelihood of serious miscarriages of justice" when criminal investigators use hypnosis.⁴⁹ An evaluation and application of each of the procedural guidelines to defendants' hypnotically induced statements shows that courts should require proof of adherence to the guidelines as the test for admissibility of hypnotically induced confessions and exculpatory statements.

Dr. Orne's guidelines consist of the following:

testimony and pseudo scientific claptrap. I quite agree that we should not waste our valuable court time watching witch doctors, voodoo practitioners or *brujas* go through the entrails of dead chickens in a fruitless search for the truth However, the idea that an eyeball witness to a transaction be denied the opportunity to tell a jury his recollections of what he saw is disturbing to me whether that recollection has been refreshed by hypnosis, truth serum, drugs, intimidation, coercion, coaching, brainwashing or impaired by the plain old passage of time."

296 Md. 670, 716, 464 A.2d 1028, 1051 (1983) (Murphy, C.J., concurring and dissenting) (quoting *People v. Williams*, 132 Cal. App. 3d 920, 927-28, 183 Cal. Rptr. 498, 501-02 (1982) (Garner, J., concurring)). See also *Hypno-Induced Statements*, *supra* note 1, at 19 n.100 (berating high standard of reliability required for admissibility of hypnotically induced testimony when eyewitness testimony causes more miscarriages of justice than any other form of proof).

⁴⁵ *Frye v. United States*, 203 F. 1013 (D.C. Cir. 1923) (first formulation of general rule governing admissibility of scientific evidence). In addition to showing the reliability of the test, the party who wants to admit the test results must also show that the test was "conducted . . . in accordance with recognized procedures," R. UDOLF, *supra* note 16, at 177 (interpreting *Frye* rule), and that the probative value of the test results will outweigh any risk of misleading the jury. FED. R. EVID. 403 (relevant evidence may be excluded if risk of prejudice, confusion, or waste of time outweighs the probative value of the evidence). See also *Hurd*, 86 N.J. at 536, 432 A.2d at 91 (risks of prejudice, confusion, and waste of time may outweigh probative value of evidence if procedure used to obtain evidence is not capable of yielding reasonably reliable results).

⁴⁶ See, e.g., *Use and Misuse of Hypnosis in Court*, *supra* note 11, at 61, 97-98; *Admissibility of Hypnotic Statements*, *supra* note 10, at 584; *Hypnosis and Evidence*, *supra* note 11, at 79; see also *Boyd Proceedings* 6190, Feb. 28, *supra* note 22, at 60 (when professionals use hypnosis for therapeutic treatment, they are not interested in whether hypnotically induced information is truthful) (direct examination of Dr. Orne).

⁴⁷ *Hurd*, 86 N.J. at 537, 432 A.2d at 92.

⁴⁸ *Hurd*, 86 N.J. at 538-46, 432 A.2d at 94-97; *Boudin*, 118 Misc. 2d at 239, 460 N.Y.S.2d at 884.

⁴⁹ *Use and Misuse of Hypnosis in Court*, *supra* note 11, at 62-63.

1. A licensed psychologist or psychiatrist trained in hypnosis must perform the hypnosis.
2. The doctor must be independent of and not regularly employed by the defense or the prosecution.
3. The doctor should receive a written memo of only those facts of the crime that the doctor needs to know to conduct the hypnosis.
4. The subject must give a prehypnotic statement of the facts as the subject recalls the facts prior to the hypnosis.
5. All contacts between the doctor and the subject must be recorded, preferably on video tape, but at least on audio tape.
6. Only the doctor and the subject should be present during the session.⁵⁰

Only licensed psychiatrists and psychologists trained in the use of hypnosis should perform hypnosis because such people are more likely than lay hypnotists or police officers to obtain accurate memory recall.⁵¹ Police officers in particular are likely to ask the subject too many leading and suggestive questions in order to obtain information favorable to the prosecution.⁵² Licensed psychiatrists and

⁵⁰ *Hurd*, 86 N.J. at 545-46, 432 A.2d at 96-97. The *Hurd* court also required that the psychiatrist conduct a prehypnotic interview to determine the type of memory loss incurred because some types of memory loss are more amenable to hypnotic restoration than others. *Id.* at 544, 432 A.2d at 95-96. Thus, the *Hurd* court required that the proponent of hypnotic evidence must (1) prove clear and convincing compliance with Orne's guidelines, (2) prove that the type of memory loss is amenable to hypnotic restoration, and (3) prove that neither the doctor nor anyone else used any "impermissibly suggestive or coercive conduct" at any time during the hypnosis. *Id.* at 533, 432 A.2d at 90; *id.* at 545-46, 432 A.2d at 96-97.

⁵¹ *Id.* at 545, 432 A.2d at 96.

⁵² See, e.g., *Boyd* Motion to Suppress, *supra* note 22, at 14. In *Boyd*, the defense argued that Dr. Trausch, the doctor who hypnotically induced the defendant's confession, suggested Boyd's entire confession to Boyd while Boyd was under hypnosis. Dr. Trausch was a former officer of the police force that arrested Boyd. *Boyd* Proceedings 6129, Feb. 18, *supra* note 22, at 506; Silberman, *supra* note 22, at 29. No one informed Boyd and Boyd's mother that Dr. Trausch was a former policeman before the Boyds agreed to let him examine the defendant. *Boyd* Motion to Suppress, *supra* note 22, at 12. At the time of the *Boyd* case, Dr. Trausch was not a licensed psychiatrist or psychologist in the state of Illinois. *Boyd* Proceedings 6129, Feb. 18, *supra* note 22, at 108. The confession Dr. Trausch hypnotically induced was neither voluntary nor accurate; thus, the court rejected the confession. Silberman, *supra* note 22, at 34.

Dr. Udolf argues that the accuracy of hypnotically induced information depends on the quality of the hypnotist-subject relationship. R. UDOLF, *supra* note 16, at 45. According to Udolf, the more neutral the relationship, the more accurate the hypnotically induced information is likely to be. Udolf further notes that police officer hypnotists are under pressure to obtain information favorable to their employers, and that police officer hypnotists usually have a "patently inaccurate" view of the memory process. *Id.* at 23. Police officer hypnotists often believe and espouse that the mind is like a video recorder that records and stores everything the mind encounters. *Id.* Psychiatrists

psychologists, trained in the use of hypnosis, are not only more likely than police hypnotists to obtain accurate memory recall, they are also more likely to qualify as experts capable of aiding the court in evaluating the reliability of the particular procedure.⁵³

The second guideline, which requires that the doctor must be independent and not regularly employed by the prosecution or defense, "will safeguard against any bias on the part of the hypnotist that might translate into leading questions, unintentional cues, or other suggestive conduct."⁵⁴

The reason for Orne's third requirement is that a written or taped memorandum of the facts known to the doctor at the time of hypnosis "will help the court determine the extent of information the hypnotist could have communicated to the . . . [subject] . . . either directly or through suggestion."⁵⁵ For example, if the doctor knows only that the police suspect that the subject has committed a murder, but the doctor does not know how the murder was committed, the doctor will be less likely to suggest details that the subject,

trained in the use of hypnosis, on the other hand, "believe memory to be a constructive and distortion-prone process." *Id.* at 23, 29; *see also* Antrim, *Your Memory Stands Accused*, 91 *SCI. DIG.* 11, 77 (1983) (memory is not a recorder; it is continually molded by variables such as stress and violence).

For further discussion, *see* *People v. Smith*, 117 *Misc. 2d* 732, 495 *N.Y.S.2d* 528, 543 (Sup. Ct. 1983) (it is important that hypnotists' questions be models of nonleading questions because hypnotized people are more receptive to suggestions than others); Margolin, *Hypnosis-Enhanced Testimony: Valid Evidence or Prosecutor's Tool?*, 17 *TRIAL* 42, 45 (Oct. 1981) (method of hypnosis is easy for police to learn "but hypnosis is like a scalpel: you wouldn't want it wielded by your janitor, only by your surgeon.") (quoting Orne, *The Nature of Hypnosis: Artifact and Essence*, 8 *J. ABNORMAL & SOC. PSYCHOLOGY* 277, 277 (1959)).

⁵³ *Hurd*, 86 N.J. at 545, 432 A.2d at 96. The *Hurd* court went on to explain that hypnosis experts should testify only on the reliability of the *specific* procedure of hypnosis in the case at bar once the court has found the *general* use of hypnosis to be reliable:

As the trial court found, the experts who testified at trial indicated that in appropriate cases and where properly conducted the use of hypnosis to refresh memory is comparable in reliability to ordinary recall. Therefore, . . . hypnosis is admissible in a criminal trial if the trial court finds that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory. If the testimony is admissible, the opponent may still challenge the reliability of the particular procedures followed in the individual case by introducing expert testimony at trial, but the opponent may not attempt to prove the general unreliability of hypnosis. The trier of fact must then decide how much weight to accord the hypnotically refreshed testimony.

Id. at 543. 432 A.2d at 95.

⁵⁴ *Id.* at 545, 432 A.2d at 96; *see also* R. UDOLF, *supra* note 16, at 45. Udolf argues that hypnotists regularly employed by one party will be under pressure to justify their fees by producing results favorable to their employers; Dr. Udolf thus stresses the importance of employing a neutral doctor to perform hypnosis in criminal cases. R. UDOLF, *supra* note 16, at 45. Udolf also suggests that the hypnotist be court-appointed. *Id.*

⁵⁵ *Hurd*, 86 N.J. at 546, 432 A.2d at 96.

in a heightened state of suggestibility, might accept as true.⁵⁶

Orne's fourth requirement of obtaining a detailed prehypnotic statement from the subject of the facts of the event increases the likelihood that the hypnotist will "avoid influencing the description by asking structured questions or adding new details."⁵⁷ A prehypnotic statement by the subject will also decrease the likelihood of attempts by counsel for either side to influence the content of the questions the hypnotist will ask the subject.

Orne's fifth requirement, the videotaping of all contacts between the hypnotist and the subject, will establish a record of the prehypnotic, hypnotic, and posthypnotic periods.⁵⁸ This visual record will enable "a court to determine what information or suggestions the . . . [subject] . . . may have received during the session and what recall was first elicited though hypnosis."⁵⁹ Additionally, a visual record will deter the hypnotist and counsel from attempting to distort the subject's recall by verbal and visual cues and suggestions.⁶⁰ Finally, the production of a complete visual record will obviate the need for extensive judicial reliance on expert answers to

⁵⁶ See, e.g., *Boyd* Proceedings 6129, Feb. 18, *supra* note 22, at 47, 63, 71. In *Boyd*, Dr. Trausch claimed that he did not know the exact cause of death before he hypnotized Boyd. (The record is unclear about how much Dr. Trausch knew about the crime before he hypnotized Boyd. Neither the police nor Dr. Trausch followed any of Orne's guidelines for recording the hypnotic process. *Id.* at 151.) Thus, when Boyd confessed to Dr. Trausch that he smothered the victim to death, *id.* at 32, 169, 173, Dr. Trausch accepted the confession as the truth and took Boyd to the police so that Boyd could tell them the truth. *Id.* at 33. An autopsy later revealed that the deceased died by ligature strangulation. Silberman, *supra* note 22, at 32. Dr. Trausch did not question Boyd about strangulation, nor about bite marks found on the deceased's body, nor did Boyd talk about these details while he was under hypnosis. *Boyd* Proceedings 6129, Feb. 18, *supra* note 22, at 173. Thus, Boyd's attorney was able to show by an independent autopsy and odontology report, *id.* at 3, that Boyd's confession was false. See *infra* note 76 for a discussion of the facts of the *Boyd* case.

⁵⁷ *Hurd*, 86 N.J. at 546, 432 A.2d at 96.

⁵⁸ *Id.* at 546, 432 A.2d at 97.

⁵⁹ *Id.*

⁶⁰ A record of the hypnotic process will guard not only against blatantly suggestive or leading questions, but also will enable the parties to determine whether the hypnotist used any subtler form of suggestion. For instance, the posthypnotic suggestion—the command given by the hypnotist to the subject just before or immediately after recovery from the hypnotic state—largely determines how the subject will view the statements the subject made under hypnosis. *Boyd* Proceedings 6190, Feb. 28, *supra* note 22, at 31. If the hypnotist tells the subject that what the subject has just remembered under hypnosis is the truth, the subject probably will believe that the hypnotically induced statements are true, and concreting will occur. *Id.* at 63; see *supra* note 16 for an explanation of concreting. A recording of the entire hypnotic process will help capture more indirect, but equally misleading posthypnotic suggestions. In the *Boyd* case, the hypnotist said to the defendant at the end of the hypnotic session, "Let's go tell people what happened, let's go talk to your mom." *Boyd* Proceedings 6129, Feb. 18, *supra* note 22, at 30-33. Dr. Martin Orne testified that to a fourteen-year-old boy, the hypnotist's statement becomes

complicated hypotheticals about the hypnotic procedure to determine whether the procedure used on the defendant was impermissibly suggestive or coercive.⁶¹

Finally, Dr. Orne requires that the hypnotist and the subject be the only persons present during all phases of the hypnotic procedure. "Although it may be easier for a person familiar with the investigation to conduct some of the questioning, the risk of undetectable, inadvertent suggestion is too great. . . . Likewise, the mere presence of such a person may influence the response of the subject."⁶²

Thus, Dr. Orne's guidelines ensure that the hypnotic process will be conducted in a manner deemed reliable by most members of the scientific community trained in the use of hypnosis.⁶³ Most experts and many courts agree that adherence to Orne's guidelines will produce information reliable enough for courts to admit that information into evidence.⁶⁴ Although adherence to the guidelines will not guarantee the veracity of hypnotically induced statements, adherence to the guidelines ensures that in many cases the hypnotically induced recall will be as reliable as that of normal memory recall.⁶⁵

In addition to Orne's guidelines, courts should require that the prosecution meet two additional requirements when the prosecution hypnotizes a suspect or defendant. First, the prosecution must prove that the defendant gave informed consent to the hypnosis in

"What you have told me is the truth . . . [l]et's tell your mother the truth." *Boyd Proceedings* 6190, Feb. 28, *supra* note 22, at 107.

⁶¹ See, e.g., *People v. Boudin*, 118 Misc. 2d 230, 232, 460 N.Y.S.2d 879, 880 (Sup. Ct. 1983) (three of four leading experts testified at trial); Margolin & Sinoway, *Hypnotically-Induced False Confession to Murder: Preliminary Questions Regarding Consent, Admissibility in Evidence and Other Legal Issues*, A.B.A. NAT'L INST. ON EXCLUSIONARY RULES, Mar.-Apr. 1977, ch. 7, § 3, at 421 n.14 [hereinafter cited as *Hypnotically-Induced False Confession to Murder*] (as of 1976, experts charged in excess of \$2000 per day to prepare trial testimony and appear in court); *Boyd Proceedings* 6190, Feb. 28, *supra* note 22, at 120, 132 (Dr. Orne berated the police for necessitating his appearance at trial, at a cost of \$1500 per day for his trial appearance and \$150 per hour for his trial preparation. Because the police made no visual or audio record of the hypnosis procedure, the court had to rely on Dr. Orne's oral testimony and hypotheticals to determine the quality of Boyd's hypnotically induced confession.).

⁶² *Hurd*, 86 N.J. at 546, 432 A.2d at 97. But see *State v. Collins*, 296 Md. 670, 676, 464 A.2d 1028, 1031 (1983) (psychiatrist prefers police officer or investigator present during hypnosis but admits this process is not in accord with the practices of most hypnotic experts).

⁶³ *Hurd*, 86 N.J. at 543, 545, 432 A.2d at 95, 96; *Boudin*, 118 Misc. 2d at 238, 239, 460 N.Y.S.2d at 884.

⁶⁴ *Hurd*, 86 N.J. at 543, 545, 432 A.2d at 95, 96; *Boudin*, 118 Misc. 2d at 238, 239, 460 N.Y.S.2d at 884.

⁶⁵ *Hurd*, 86 N.J. at 543, 432 A.2d at 95.

the presence of counsel.⁶⁶ Informed consent to the use of hypnosis in the presence of counsel will ensure that a defendant's hypnotically induced confession is voluntary.⁶⁷ Second, courts should require independent verification of all hypnotically induced confessions before admitting those confessions into evidence because hypnosis does not guarantee the veracity of hypnotically induced statements, but merely aids in memory recall.⁶⁸ Consequently, when prosecutors use hypnosis to obtain confessions from suspects and defendants, the prosecution must independently verify the confession to meet the prosecution's burden of proof of guilt beyond a reasonable doubt.⁶⁹ Because hypnosis induces a highly suggestive state of mind, prosecutors who wish to hypnotize suspects and defendants should adhere to the additional safeguards of informed consent and independent verification in order to prevent the possibilities of involuntary or false self-incrimination.

B. HYPNOTICALLY INDUCED CONFESSIONS

Involuntary confessions are inadmissible against a defendant in court.⁷⁰ Thus, the party seeking to admit a hypnotically induced confession must first prove that the defendant voluntarily consented to the use of hypnosis.⁷¹ Second, the proponent of the hypnotically induced confession must prove that the hypnotic procedure was not conducted in an impermissibly suggestive or coercive manner.⁷² Third, because hypnosis does not guarantee the veracity of the hypnotically induced statements, the proponent of the hypnotically induced confession must independently verify the confession in order

⁶⁶ See *infra* notes 86-88 and accompanying text.

⁶⁷ See *infra* notes 74-75, 80-88 and accompanying text.

⁶⁸ See *infra* notes 85-88 and accompanying text.

⁶⁹ See *infra* notes 73, 85-88 and accompanying text.

⁷⁰ *Lego v. Twomey*, 404 U.S. 477 (1972) (prosecution bears the burden of establishing voluntariness of the confession by a preponderance of the evidence); *Brown v. Mississippi*, 297 U.S. 278 (1936) (involuntary confessions are not admissible in court, and test of voluntariness is "the totality of the circumstances" under which the defendant confessed).

⁷¹ Silberman, *supra* note 22, at 34 (holding hypnotically induced confession not admissible when defendant did not voluntarily consent to use of hypnosis). Involuntary hypnosis is hypnosis "produced without the explicit consent of the subject, as opposed to hypnosis against the will of the subject. The latter means hypnosis produced despite the subject's active opposition, which is extremely unlikely if not impossible." R. UDOLF, *supra* note 16, at 192-93; see also *Boyd* Proceedings 6190, Feb. 28, *supra* note 22, at 34-35, 41, 73 (Orne testifying that it is possible to hypnotize a subject without the subject's knowledge).

⁷² *Hurd*, 86 N.J. at 533, 432 A.2d at 90.

to sustain the burden of proving guilt beyond a reasonable doubt.⁷³

In *People v. William Boyd, Jr.*,⁷⁴ the fourteen-year-old defendant, without the aid of counsel, allowed a "doctor" obtained by the police to perform a "relaxation technique" on him.⁷⁵ The police told Boyd that the doctor would help him to remember the events of the night before when someone murdered a girl in the defendant's backyard.⁷⁶ Immediately following the conclusion of the "relaxation technique," Boyd confessed to the police that he had smothered the victim to death.⁷⁷ In a pretrial hearing on a motion to suppress the confession, the court ruled that the "relaxation technique" amounted to hypnosis.⁷⁸ The court further held that because Boyd had not knowingly consented to the use of hypnosis, Boyd's hypnotically induced confession was not voluntary and was therefore

⁷³ See *In re Winship*, 397 U.S. 358 (1970) (due process requires state to establish guilt beyond reasonable doubt in criminal cases).

⁷⁴ *Boyd Proceedings*, Feb. 18, *supra* note 22; *Boyd Proceedings* 6190, Feb. 28, *supra* note 22; *Boyd Proceedings* 6129, Feb. 28, *supra* note 22. See *supra* note 22 for complete citations to the *Boyd* case.

⁷⁵ When asked to describe his "relaxation technique," the doctor in the *Boyd* case stated that he took the defendant to a comfortable private room, wrapped him in a blanket, and asked him to relax by focusing on his breathing. *Boyd Proceedings* 6129, Feb. 18, *supra* note 22, at 18-22. The doctor then told the defendant to lie down, close his eyes, and continue breathing deeply. *Id.* at 24-25. The doctor then began questioning the defendant about the murder and eventually obtained a "confession." *Id.* at 27-33; see also Silberman, *supra* note 22, at 30 (Pomaro, J., held "relaxation technique" was in fact hypnosis).

⁷⁶ *Boyd Proceedings*, Feb. 18, *supra* note 22, at 13. Boyd's sister and several other young teenagers spent Friday evening, July 17, 1981, playing strip poker in the Boyds' backyard playhouse. During the course of the game, Mary Kozinski, the murder victim, rebuffed Boyd. The children had planned to sleep in the playhouse, but the Boyds' father eventually ordered the Boyd children to come inside the house. At that time, the other children went home and only Kozinski spent the night in the playhouse. Silberman, *supra* note 22, at 27.

At 10:00 a.m. Saturday, July 18, 1981, the defendant went out to the playhouse and discovered the mutilated body of Mary Kozinski under a pillow. *Id.* Throughout Saturday and into the early morning hours of Sunday, July 19, the police interrogated young Boyd at home and at the station house. The police repeatedly told Mrs. Boyd that they had not arrested Boyd; thus, they told her not to get an attorney, but instead to allow Dr. Trausch to see her son. When Trausch arrived at the station house late Saturday night, he hypnotized Boyd without Boyd's consent. *Boyd Proceedings*, Feb. 18, *supra* note 22, at 13, 22. At 3:30 a.m. Sunday, July 19, 1981, Boyd confessed to smothering Kozinski. *Boyd Motion to Suppress*, *supra* note 22, at 1. An autopsy later revealed that Kozinski was strangled to death, and an odontology report showed that the teethmarks all over her body were not Boyd's. *Boyd Proceedings* 6190, Feb. 28, *supra* note 22, at 3; Silberman, *supra* note 22, at 32.

⁷⁷ *Boyd Motion to Suppress*, *supra* note 22, at 15.

⁷⁸ *Boyd Proceedings* Feb. 18, *supra* note 22, at 88, 92, 96, 180 (in cross-examination of Dr. Trausch, the defense established that Dr. Trausch used hypnotic techniques on Boyd but did not tell Boyd that techniques were hypnotic); *Boyd Proceedings* 6190, Feb. 28, *supra* note 22, at 97 (in direct examination of Dr. Orne, the defense established that Dr. Trausch used hypnosis on Boyd); Silberman, *supra* note 22, at 30.

inadmissible.⁷⁹

Because hypnosis can be induced without the knowledge and therefore without the consent of the subject, courts should not admit hypnotically induced confessions unless the suspect or defendant, in the presence of counsel, gives informed consent to the use of hypnosis.⁸⁰ The aid of counsel is necessary to prevent the prosecution from preying on the defendant's ignorance of the possibility that the hypnosis may produce incriminating admissions or confessions that the prosecution can use against the defendant in a court of law.⁸¹ No safeguard can entirely prevent deceptive uses of hypnosis, such as the "relaxation technique" used by the prosecution in *Boyd*. The requirement of informed consent in the presence of counsel, however, will at least diminish deceptions about the highly suggestive and potentially coercive nature of hypnosis.⁸²

⁷⁹ Silberman, *supra* note 22, at 32. Dr. Udolf has stated:

In view of the fact that the induction of hypnosis requires the cooperation of the subject, the question arises how it could ever be considered to be involuntary. The answer is that *involuntary* does not mean *against the will of* but *without the consent of* the subject. It would appear to be impossible to hypnotize a subject who actively resists hypnosis; however, it is quite possible to induce hypnosis and get the subject's cooperation in a setting that he does not recognize as hypnosis. Examples of this would be describing the procedure as relaxation.

R. UDOLF, *supra* note 16, at 102 (emphasis in original).

For cases involving deceptive uses of hypnosis by prosecutors on defendants, see *Leyra v. Denno*, 347 U.S. 556 (1954) (doctor does not label technique, but experts call it hypnosis); *Parker v. Sigler*, 413 F.2d 459 (8th Cir. 1969), *vacated*, 396 U.S. 482 (1970) (confession held involuntary where doctor's touching, patting, and stroking of defendant amounted to typical persuasive techniques capable of yielding hypnotic trance); *Rex v. Booher*, 4 D.L.R. 795 (Can. 1928) (confession held involuntary where induced by doctor who claimed to practice mesmerism but not hypnotism); *Hypnotically-Induced False Confession to Murder*, *supra* note 61, at 5d (confession held invalid in unreported case where suspect explicitly consented to hypnosis but neither had an attorney nor understood possibility of making incriminating statements while under hypnosis).

⁸⁰ See, e.g., *Leyra*, 347 U.S. at 561 (due process does not permit use of psychiatrically induced confessions extracted from lone defendant unprotected by counsel); *State v. Nemoir*, 62 Wis. 2d 206, 214 N.W.2d 297 (1974) (requiring consent in presence of counsel to admit into evidence polygraph test results); R. UDOLF, *supra* note 16, at 111-12 (the results of involuntary hypnosis should never be admitted in court; if the proponent proves proper management of hypnosis and informed consent to hypnosis, hypnotically induced evidence should be admissible).

⁸¹ See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981) (fifth amendment privilege against self-incrimination forbids admissibility of evidence based on psychiatric interview of defendant who was not warned of his right to remain silent); *People v. Boggs*, 107 Cal. 492, 290 P. 618 (1930) (for consent to be legal, subject must intelligently understand the possible consequences of the act); *People v. Leyra*, 302 N.Y. 353, 358, 98 N.E.2d 553, 559 (1951) (court unwilling to allow state to establish relationship between doctor and defendant in order for doctor to mentally coerce defendant into making a confession).

⁸² See, e.g., *Hypnotically-Induced False Confession to Murder*, *supra* note 61, at 5a. The authors relate the story of an unpublished case in which a teenaged suspect in a murder case consented, without aid of counsel, to let the police hypnotize her. Present at the audiotaped hypnosis were the suspect, a physician hired by the police, two men from the

After proving that the defendant knowingly consented to the use of hypnosis in the presence of counsel, the party seeking to admit the hypnotically induced confession in court must prove that the prosecution did not conduct the hypnosis in an impermissibly suggestive or coercive manner.⁸³ Adherence to Dr. Orne's guidelines will provide an adequate record from which the court can evaluate the suggestibility and reliability of the hypnotic procedure.⁸⁴

Finally, in order for a hypnotically induced confession to be admissible in court, the confession should be independently verifiable.⁸⁵ Psychiatrists trained in the use of hypnosis agree that

police department, and one man from the Federal Bureau of Investigation. The prehypnotic interview began thus:

Q: Now, we want to advise you of certain things things [sic] Tina, before we proceed with this. You realize that you're here to be placed under hypnosis by Dr. Kroger?

A: Yes.

Q: Okay, and this is voluntary on your part.

A: Yes.

Q: What were the other things you suggested?

A: Only that she agree that Dr. Kroger will induce the hypnosis and that it is voluntary.

Q: Okay, it is voluntary on your part and [questioner interrupted by following response]

A: Yes.

Q: That's probably all we need. Anything on *Miranda*?

Q: If you think it's necessary, I don't think it would hurt. . . . [reading of *Miranda* rights. . . .]

Q: Okay, having them in mind, will you voluntarily freely proceed with this?

A: Yes.

Q: Okay, I think we are all set.

Id. The session progressed with the doctor unfolding most of the story and seeking confirmation of the tale from the suspect. The suspect never actually confessed to the murder, but she had assented to enough of the story laid out by her "friends," that the police arrested her and charged her with the murder. *Id.* at 1a. The charges were dropped when defense counsel proved that there were major inaccuracies in the hypnotically induced "confession." *Id.* Unlike the defendant in *Boyd*, the suspect in this case consented to the use of hypnosis. *Id.* at 5a. The police, however, did not warn the suspect that hypnosis induces a highly suggestible state of mind that may cause a subject to make self-incriminating statements regardless of whether those statements are true. Thus, the case demonstrates that hypnosis in the hands of the prosecution against a defendant unaided by counsel amounts to deceptive mental coercion. As the authors reporting this case stated:

The transcript is replete with proforma disclaimers, of "you don't have to answer unless you want to answer," in place of threats there are inducements; it is all very sophisticated. Yet, somehow, one walks away from the transcript shocked at the rape of the mind, somehow even the more dirty for the mendacious disclaimers of the rapist, astride his victim, that "well, hypnotized minor, you don't really have to continue with the sexual act, if you don't want to do it."

Id. at 3a.

⁸³ *Hurd*, 86 N.J. at 533, 432 A.2d at 90.

⁸⁴ *Id.* at 545, 432 A.2d at 96; see *supra* notes 44-62 and accompanying text.

⁸⁵ *Use and Misuse of Hypnosis*, *supra* note 11, at 72-73 (independent verification is the only way to guarantee veracity of hypnotically induced information).

hypnosis does not guarantee the truthfulness of hypnotically induced statements, but merely aids in memory recall.⁸⁶ The scientific community also agrees that false confessions to crimes are common when someone has a psychological need to expunge feelings of guilt or gain attention.⁸⁷ Under hypnosis, the subject's desire to gain favorable attention by pleasing the hypnotist often outweighs the subject's capacity to critically judge the veracity and consequences of their statements.⁸⁸ Consequently, in order to prove the truth of a hypnotically induced confession, and thus sustain the burden of proving guilt beyond a reasonable doubt, the party seeking to admit the hypnotically induced confession must independently verify the confession.

C. HYPNOTICALLY INDUCED EXCULPATORY STATEMENTS

In *Greenfield v. Commonwealth*, the police accused Greenfield of murder, and Greenfield underwent hypnosis at the request of his own attorney because Greenfield could not remember anything about the murder.⁸⁹ The hypnosis did not induce any new memories, and the doctor who hypnotized Greenfield concluded from the

⁸⁶ *Id.*; see also *Hurd*, 86 N.J. at 538, 432 A.2d at 92; *People v. Hughes*, 59 N.Y.2d 523, 532-35, 453 N.E.2d 484, 487-89, 466 N.Y.S.2d 255, 258-60 (1983); R. UDOLF, *supra* note 16, at 71.

⁸⁷ Dr. Udolf states that "some mentally disturbed people have so great a need for punishment or attention that they confess to crimes they could not possibly have committed." R. UDOLF, *supra* note 16, at 100.

⁸⁸ *Hurd*, 86 N.J. at 539-40, 432 A.2d at 93. Dr. Orne states that the likelihood of a false confession under hypnosis is greater than under normal circumstances because of the suggestive procedure of hypnosis:

False confessions are common . . . Why do people ever confess[?], . . . because the opinion that the person interrogating you has of you becomes more important to them [sic] than anything else . . . They confess for that good opinion. In hypnosis, the need to please the hypnotist is vastly increased . . . especially if there are guilt feelings. . . . Psychological needs are what determines [sic] not what is logically in their [sic] self-interest. . . . Under those circumstances he might well come out with things that are against his long-term interest but satisfy the psychological need of the moment.

Boyd Proceedings 6190, Feb. 28, *supra* note 22, at 109-11.

⁸⁹ 214 Va. 710, 713, 204 S.E.2d 414, 417 (1974), *writ of habeas corpus denied sub nom.* *Greenfield v. Robinson*, 413 F. Supp. 1113, 1117 (W.D. Va. 1976). The police accused Greenfield of murdering a female friend one evening after work. The girl had given Greenfield a ride home from work and as he got out of the car, Greenfield fainted. 413 F. Supp. at 1116. The next thing Greenfield could recall was that he was lying on the ground some 15 feet from the driver's side of the car, and that the deceased was lying in a pool of blood in the front seat. *Id.* Greenfield noticed his pocket knife on the floor of the car, saw that his hands were cut and bleeding, and ran from the scene. *Id.* Under hypnosis, Greenfield could not recall anything more about the time between when he fainted and when he woke up. *Id.* at 1117. But under hypnosis, Greenfield did recall that after he woke up, he chased a man from the scene who was wearing a jacket similar to his own jacket. 413 F. Supp. at 1117.

hypnosis that Greenfield was unconscious at the time of the murder.⁹⁰ Greenfield's attorney sought to admit both the doctor's opinion regarding the defendant's state of being at the time of the murder, as well as the defendant's hypnotically induced statements.⁹¹ Greenfield's attorney sought these admissions "in order to fully develop [Greenfield's] defense because there were no eyewitnesses to the crime, he had no memory of having committed the crime, and he was not identified as the man seen running from the scene of the crime."⁹² The court held that although the doctor's opinion regarding the defendant's unconsciousness during the crime was admissible, the doctor was not allowed to refer to the hypnosis to help explain the basis of his opinion that Greenfield was unconscious at the time of the murder.⁹³ Nor was the defense permitted to admit the substance of the defendant's hypnotically induced statements because of the "potential unreliability" of hypnotic evidence.⁹⁴

Likewise, in *People v. Hangsleben*, the police accused the defendant of committing two murders, and the defendant underwent hypnosis at the request of his attorney because the defendant could not accurately remember the events of the two murders.⁹⁵ In court, Hangsleben's attorney first sought to call the psychiatrist who hypnotized Hangsleben to testify to Hangsleben's hypnotically induced

⁹⁰ 413 F. Supp. at 1117.

⁹¹ *Id.*

⁹² *Id.* at 1120.

⁹³ *Id.* at 1117.

⁹⁴ 413 F. Supp. at 1120. The defendant could not testify on his own behalf from present memory refreshed because he had not remembered anything under hypnosis. The defendant's counsel apparently did not require the hypnotist to make audio or visual tapes of the hypnotic procedure. Thus, the defendant's counsel sought to have the doctor relate to the court the substance of the hypnotic session or to have the defendant testify under hypnosis in court. 214 Va. at 715, 716, 204 S.E.2d at 419; 413 F. Supp. at 1117. In affirming the state court's denial of either method of admitting the substance of the defendant's hypnotically induced statements, the United States district court stated:

This court knows of no rule that requires a judge to accept evidence of uncertain value to go to a defense that is otherwise completely uncorroborated. The mere fact that the crime has no eyewitness or direct evidence does not warrant a court to accept evidence that may be able to tell the trier of fact something about the crime, but may also be of dubious quality.

413 F. Supp. at 1120-21.

⁹⁵ 86 Mich. App. 718, 728, 273 N.W.2d 539, 543 (1978). The police charged Hangsleben with the slaying of two girls who lived across the street from him. *Id.* at 720, 273 N.W.2d at 540. Hangsleben's attorney hired a psychiatrist who hypnotized Hangsleben. *Id.* at 727-28, 273 N.W.2d at 543. Under hypnosis, Hangsleben recalled that he was in the girls' house on the night of the murders, but that a third person had killed the girls. *Id.* at 727, 273 N.W.2d at 543.

statements and to play an audiotape of the hypnotic conversation.⁹⁶ The court held that the psychiatrist could not testify as to the substance of the hypnotic session and that the defense could not play a tape of the hypnotic session, because the defense had failed to lay an adequate foundation for the reliability of hypnosis.⁹⁷

Because Hangsleben testified in his own behalf and told the jury a different story than what he had told the police prior to being hypnotized, the defense also sought permission to make reference to the hypnosis in order "to bolster the credibility of defendant's story at trial by arguing that the hypnosis had a mind-jogging effect, which would help explain defendant's earlier inconsistent admissions to police."⁹⁸ The court held that the defendant's counsel could not make reference to the hypnotic session because he had again "failed to establish the reliability of hypnosis as a memory jogging device."⁹⁹

Thus, a failure to establish the reliability of hypnotically induced statements was the rationale for the exclusion of evidence that may have aided the defendants in both *Greenfield* and *Hangsleben*. If the defendants' counsel had followed Dr. Orne's guidelines for the management of hypnotic sessions, the courts in *Greenfield* and *Hangsleben* should have admitted the substance of the defendants' hypnotically induced statements as well as the medical conclusions drawn from the hypnotic sessions; adherence to Orne's guidelines ensures that the hypnotically induced evidence will be reliable enough to admit in court.¹⁰⁰

Furthermore, courts should admit such evidence even if the defendants' counsel cannot independently verify the hypnotically induced exculpatory statement because the only burden the defense bears in a criminal trial is to raise a reasonable doubt as to the defendants' guilt in the minds of the jurors.¹⁰¹ Thus, the lack of in-

⁹⁶ *Id.* at 727, 273 N.W.2d at 543.

⁹⁷ *Id.* at 728, 730-31, 273 N.W.2d at 544-45. The court continued:

the only factual foundation offered to the trial court was defendant's assertion that the witness was a qualified psychiatrist. In his brief defendant also quotes the Encyclopedia Britannica which merely defines . . . the theory of hypnotic memory restoration. That does not demonstrate . . . general scientific acceptance. . . . Absent an impartial showing that hypnosis has been successful in restoring the memory of persons other than defendant, either by testimony of other subjects or experts, the references in this case were properly rejected as being of tenuous probative value.

Id. at 730-31, 273 N.W.2d at 545.

⁹⁸ *Id.* at 728, 273 N.W.2d at 543 (testimony conflicted as to whether defendant ever actually confessed to killing the girls).

⁹⁹ *Id.* at 730, 273 N.W.2d at 544.

¹⁰⁰ *Hurd*, 86 N.J. at 538-46, 432 A.2d at 94-97.

¹⁰¹ But see *supra* notes 73, 85-88 and accompanying text, explaining that when the prosecution seeks to admit a hypnotically induced confession in a criminal trial, the

dependent verification should go to the weight and not to the admissibility of the exculpatory statement. When the only evidence at defendants' disposal with which to raise that doubt in the minds of the jurors is the defendants' own memories, unlocked through the use of hypnosis, courts should admit the substance of those memories into evidence once defendants' counsel have established their reliability. Inherent in defendants' right to due process are the rights to testify and to produce testimony in their own defense.¹⁰² Courts should admit hypnotically induced exculpatory statements as additional testimony for juries to consider in their determinations of guilt or innocence. Whether the hypnotically induced testimony will have the effect of reducing or enhancing the defendants' credibility with the jury is a risk for the defendants and their counsel to consider.¹⁰³ Once the defendants' counsel have established the reliability of the testimony by showing adherence to Dr. Orne's guidelines, the court's only job is to see to it that the defense admits the hypnotically induced evidence in accordance with the applicable state, common law, or federal rules of evidence.

The defense could seek to admit the substance of a defendant's hypnotic session at trial in several ways. The defense could:

1. Place the defendant on the stand to testify from hypnotically refreshed memory.¹⁰⁴
2. Play audio or video tapes of the session for the jury if the defendant does not wish to take the stand.¹⁰⁵
3. Place the psychiatrist or psychologist who performed the hypnosis on the stand to testify to the substance of the session and/or to their medical opinion of the defendant's state of being at the time of the crime, based on the hypnotic interview.¹⁰⁶
4. Place the defendant under hypnosis while the defendant is on the stand.¹⁰⁷

prosecution must independently verify the confession because the prosecution bears the burden of establishing the defendant's guilt beyond a reasonable doubt.

¹⁰² *Washington v. Texas*, 388 U.S. 14 (1967) (due process includes right to present exculpatory evidence to establish innocence).

¹⁰³ See, e.g., *Hangsleben*, 86 Mich. App. at 730, 273 N.W.2d at 544 (ordinarily any reference to hypnotic memory restoration tends to impeach, rather than rehabilitate, the credibility of a defendant's present memory); *contra* *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 185-86, 644 P.2d 1266, 1271-72 (1982) (lay people believe hypnosis prevents lying, and juries are likely to give hypnotically induced evidence undue weight).

¹⁰⁴ See, e.g., *Hangsleben*, 86 Mich. App. 718, 273 N.W.2d 539 (1978).

¹⁰⁵ See, e.g., *Greenfield*, 214 Va. 710, 204 S.E.2d 414 (1974), *writ of habeas corpus denied sub nom. Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Some of these methods are more likely than others to conflict with rules of evidence. The psychiatrist's statement of what the defendant said while under hypnosis will bring an objection of hearsay, and it will be difficult for the defense to squeeze such testimony into one of the exceptions to the hearsay rule.¹⁰⁸ Likewise, most courts have thus far disallowed the hypnotizing of a defendant or witness while on the stand for fear that the dramatics of the procedure will muddle the judgment of the jury.¹⁰⁹ Courts should, however, allow a defendant to testify from hypnotically refreshed memory,¹¹⁰ or to present a video or audiotape of the hypnotic session.¹¹¹

¹⁰⁸ Most courts, however, have allowed psychiatrists to state that they used hypnosis to help determine the defendant's mental state. See *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); *People v. Modesto*, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963); *State v. Turner*, 81 N.M. 450, 468 P.2d 421 (N.M. Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970); *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974); cf. *People v. Busch*, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961); *Hangsleben*, 86 Mich. App. 718, 273 N.W.2d 539 (1978); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974), writ of habeas corpus denied sub nom. *Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976). Likewise, most experts deem hypnosis a valid tool to use in the determination of a subject's mental state. See R. UDOLF, *supra* note 16, at 62, 117.

¹⁰⁹ See, e.g., *Greenfield*, 214 Va. at 710, 204 S.E.2d at 414 (noting that other courts have not considered it an error to disallow any reference to hypnosis by the defense because the use of hypnosis unduly influences the jury).

¹¹⁰ For cases holding that both the prosecution and the defense may use witnesses who have been hypnotized prior to trial and who will testify at trial from present memory refreshed, with the fact of hypnosis going to the weight rather than the admissibility of the hypnotically refreshed testimony, see *United States v. Awkard*, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979); *United States v. Adams*, 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978); *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974); *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969); *United States v. Nariciso*, 446 F. Supp. 252 (D. Mich. 1977); *Clark v. State*, 379 So. 2d 372 (Fla. App. 1979); *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946 (1980); *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *Pearson v. Indiana*, 441 N.E.2d 468 (Ind. 1982); *Strong v. State*, 435 N.E.2d 969 (Ind. 1982); *State v. Wren*, 425 So. 2d 756 (La. 1983); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981), cert. quashed, 98 N.M. 51, 644 P.2d 1040 (1982); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Ct. App. 1981); *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982).

¹¹¹ See, e.g., *People v. Modesto*, 59 Cal. 2d 722, 732-33, 382 P.2d 33, 39-40, 31 Cal. Rptr. 225, 231 (1963) (it is error to exclude explanation of hypnotic techniques used in a psychiatric examination as a basis of expert opinion; it is error to exclude, without any consideration of its admissibility, evidence in the form of a tape recording of the defendant's statements while under hypnosis); *People v. Thomas*, Crim. No. 3274 (Cal. Ct. App. Jan. 9, 1969) (court admitted film of defendant under hypnosis to establish defendant's lack of intent to commit crime) (reported in Comment, *Hypnosis as a Defense Tactic*, 1969 U. Tol. L. Rev. 691).

If, on the one hand, after having undergone hypnosis, defendants desire to testify in court from hypnotically refreshed memories about the events in question, the prior use of hypnosis will go to the weight and credibility of the evidence and not to the admissibility of the evidence.¹¹² On the other hand, situations will arise in which a defendant does not want to take the stand or perhaps still has no present memory of the crime and therefore cannot take the stand.¹¹³ In those situations, courts should admit into evidence the audio or videotapes of the hypnotic session¹¹⁴ unless the party opposed to the admission of the tapes can show that the risk of misleading or unfairly prejudicing the jury will outweigh the probative value of the hypnotically induced testimony.¹¹⁵ With proper jury instructions, however, aimed at demystifying the hypnotic procedure and emphasizing the "fallibility of human memory"¹¹⁶ under normal as well as hypnotic conditions, courts should be able to admit most tapes of hypnotic procedures. Furthermore, in cases like *Greenfield v. Robinson*, where defendants' hypnotically induced statements and the doctors' medical conclusions based on those statements are the only evidence that defendants can produce in their own behalf, justice requires courts to admit the tapes.

¹¹² See, e.g., *supra* note 111.

¹¹³ See, e.g., *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974), *writ of habeas corpus denied sub nom. Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976).

¹¹⁴ See, e.g., FED. R. EVID. 804(b)(5)(B), stating that an otherwise trustworthy statement will not be barred by the hearsay rule if "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Adherence to Dr. Orne's guidelines will in many cases produce hypnotic statements as reliable and trustworthy as statements produced by normal human recall. *Hurd*, 86 N.J. at 537, 543, 432 A.2d at 92, 95. See also *Hypno-Induced Statements*, *supra* note 1, at 40. The author states:

Four arguments are generally urged in support of the exclusion of hearsay statements: (1) the statements are not attended by the solemnity of an oath; (2) the factfinder is unable to observe the demeanor of the out-of-court declarant; (3) the witness may not accurately report the out-of-court declaration; and (4) there is no opportunity to cross-examine the declarant. Reduced to a common denominator, the problem is one of assumed unreliability. Indeed, the various exceptions to the hearsay rule derive from the counter-assumption of reliability. And it is this same counter-assumption which underlies the argument in favor of the admissibility of hypno-induced and related statements. Once the proper foundation is established, . . . the reasons in support of the hearsay rule vanish. Consequently, the hearsay rule should not be a bar to admissibility.

Id. (citations omitted).

¹¹⁵ See, e.g., FED. R. EVID. 403 (relevant evidence may be excluded on grounds of prejudice, confusion, or waste of time).

¹¹⁶ *Hurd*, 86 N.J. at 542, 432 A.2d at 95 (fallibility of human memory poses challenge to our system of justice).

IV. CONCLUSION

The case law and scientific opinions agree that hypnosis may produce memory distortions, and that hypnosis will not guarantee the truthfulness of hypnotically induced statements. Most of the courts and experts also agree, however, that adherence to Dr. Orne's procedural guidelines increases the likelihood that hypnotically induced information will be reliable enough to admit in court. In light of the judicial and scientific consensus on the nature of hypnosis and the capacity of Dr. Orne's guidelines to ensure a high degree of reliability of hypnotically induced statements, courts should adopt Dr. Orne's guidelines as the test for determining whether to admit hypnotically induced confessions and exculpatory statements into evidence.

Criminal suspects and defendants have constitutional rights to be free from self-incrimination and to aid in their own defenses. Thus, when the prosecution seeks to admit a hypnotically induced confession into evidence, the prosecution, in addition to proving adherence to Orne's guidelines, must prove that the defendant gave voluntary informed consent to the use of hypnosis in the presence of counsel. Because hypnosis does not guarantee truthfulness, but merely aids in memory recall, the prosecution also must verify independently the confession to sustain the prosecution's burden of proof of guilt beyond a reasonable doubt. Conversely, when the defense seeks to admit into evidence a hypnotically induced exculpatory statement, the defense does not have to verify the statement independently because the defense's only burden in a criminal trial is to raise a reasonable doubt as to the defendant's guilt in the minds of the jurors. Justice requires courts to admit such exculpatory statements when the statements contribute to raising that reasonable doubt.

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